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IN THE

Supreme Court of the United States

October Term, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 4, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit was issued on October 4, 1968, but is as yet unreported. It is annexed hereto, and appears at pages A-1 –

A-11 of Appendix A.[1] There are also set forth in Appendix A the memorandum orders of the United States District Court for the Southern District of New York dated (1) December 6, 1967, denying petitioner's motion to reduce and suspend sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, (2) January 4, 1968, adhering to the decision embodied in the earlier order, and (3) January 27, 1968, denying an order to show cause why a writ of error *coram nobis* or in the nature of *coram nobis* should not be granted.[2]

JURISDICTION

The judgment of the Court of Appeals (App. A, pp. A-1 – A-11) was entered on October 4, 1968. On October 23, 1968, Mr. Justice Harlan granted an extension of time to file this petition to December 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Citations to Appendix A hereinafter will appear "App. A, p. ."

[2] The orders of December 6, 1967, and January 4, 1968, are also contained in the "Order to Show Cause, Affidavit of Counsel and Affidavit-Petition of Saul I. Birnbaum" at pages 12-13. That document is cited hereinafter as "CNA, p. ." The record also contains a "Memorandum in Support of Motion for a Writ of Error Coram Nobis or in the Nature of Coram Nobis." That document is cited hereinafter as "CNM, p. ." In addition, the record contains a bound collection of "Exhibits Attached to Petition," tabbed Exhibit Nos. 1 through 10, supporting the application for a writ of error *coram nobis* or in the nature of *coram nobis*. Citations to those documents hereinafter will appear "CN Ex. No. , p. ."

QUESTIONS PRESENTED

1. Does a federal trial judge (not acting pursuant to 18 U.S.C. §4208(b)) have authority to impose on a convicted defendant a tentative sentence "for the present," reserving both imposition of final sentence and consideration of factors relevant to the sentence until after the defendant has exhausted his right to appellate review?

2. Where a federal trial judge, because of the defendant's failure to admit guilt and his intention to appeal his conviction, imposes a prison sentence subject to reconsideration and possible reduction to probation after the defendant's appeal, and defers until that time consideration of factors relevant to the sentence; where the judge at the time he imposes the original sentence specifies certain conditions under which he might reduce that sentence to probation, and there is a subsequent unrebutted showing that those conditions have been satisfied; and where the defendant's appeal vigorously attacks the judge's conduct of the trial and the prosecutor contends at the time of reconsideration that the arguments made on appeal militate against reduction of sentence; does the trial judge's unexplained post-appeal refusal to reduce the original sentence require corrective action by this Court in the exercise of its supervisory authority over the administration of criminal justice in the federal courts?

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The Fifth, Sixth and Eighth Amendments to the Constitution of the United States; 18 U.S.C. §4208(b), 72 Stat. 845; and Rule 35 of the Federal Rules of Criminal Procedure, are set forth in Appendix B to this petition.

STATEMENT

This case raises fundamental issues concerning the relationship between the sentencing and the appellate processes in the federal courts. the essential issue is whether a federal trial judge may impose a tentative, "for the present," sentence which he says he will reconsider and "might" reduce to probation after the conviction is affirmed on appeal.

The factual situation which presents these issues arose following the conviction of the petitioner in the United States District Court for the Southern District of New York for conspiring to bribe and bribing an agent of the Internal Revenue Service in violation of 18 U.S.C. §§2, 201 and 371.[3] At the sentencing proceeding held April 1, 1966, United States District Court Judge Irving Ben Cooper, who had presided at the trial, imposed what can best be characterized as a "tentative" sentence – a sentence "[f]or the present, then, in the light of your f[r]ame of mind."[4] The frame of mind to which

---

[3] The conviction was subsequently affirmed by the United States Court of Appeals for the Second Circuit in *United States v. Birnbaum*, 373 F.2d 250 (2d Cir.), *rehearing denied*, 375 F.2d 232 (2d Cir. 1966), *cert. denied*, 389 U. S. 837 (1967). A previous conviction under the same indictment had been reversed. *United States v. Birnbaum*, 337 F.2d 490 (2d Cir. 1964).

[4] The pertinent portions of Judge Cooper's remarks at sentencing are contained in CNM, pp. 2-4. In that document, the paragraph starting with the words "For the present, the " is reproduced to read: "For the moment, then". However, the Court of Appeals' opinion quotes the language as set out above in text. App. A, p. A-3. Examination of the original transcript indicates that the Court of Appeals is correct. *United States v. Birnbaum*, No. 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Irving Ben Cooper, April 1, 1966, p. 2183. For convenience, Judge Cooper's remarks are also set forth below:

the judge was referring was that petitioner had "not accepted the jury's verdict," *i.e.*, that petitioner would not confess his guilt. Since petitioner continued to "protest

---

4 (Cont'd)

> . . . This is your first criminal conviction. The presentence report and other items brought to this Court's attention do not make you out a callous, insensitive human, one totally devoid of decent behavior.
>
> After all, there are varying degrees of inequity [sic]. I do not regard you as beyond recall. By extraordinary perseverance you weathered the vicissitudes that came with advancing from an economically deprived boyhood to an overwhelming secure economic status as a certified public accountant.
>
> Your grievous error, and here is where I quarrel with the emphasis placed by your attorney, lay in regarding your achievements as the be all and end all of life. By ceaseless hard work, which characterizes a lot of Americans who started from scratch, who had physical limitations – blindness, hunchback, absence of a leg, paraplegics – but it must be said that by ceaseless hard work, you drove a keen brain without letup, but only in one direction, and that was the greedy accumulation of money.
>
> Economic security has been your goal at all cost and no matter what toll it took in denying to yourself most of all the real values of life. . . .
>
> . . . .
>
> . . . There are, and this is fortunate for you, those few who still believe in you, including Mr. Justice Heller [a New York State Supreme Court Justice], and who seem genuinely anxious about your fate.
>
> I feel compelled to make the observation that you have had only a nodding acquaintance with charity and communal affairs. You have had no time for either. You amassed a fortune, a real fortune. Only in America can that happen. Yet, you gave back nothing; nothing, other than a token contribution. You gave nothing back to your school, to your community, to your country.

(Cont'd)

[his] innocence and . . . [was] on the way to appeal," Judge Cooper decided that "now is not the time to explore" concededly relevant affirmative aspects of

---

4 (Cont'd)

> . . . Your sense of values is warped. There has been emphasis on one thing, and that has been a brilliant mathematical mind and what it could produce – false values; empty; devoid of any real sense in going through life.
>
> I know that by far and large that is the open sesame. We all know that, those of us who have really lived and rubbed elbows with all kinds of humanity . . . . I believe you have the instinct to respond to the outcry of the deprived and the unfortunate among us. That feeling resides in latent stage within you, but it might very well be aroused and find expression in overt, tangible action.
>
> However, now is not the time to explore that phase, for you have not accepted the jury's verdict and faced up to its import. You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> For the present, then, in the light of your f[r]ame of mind, let me just add that if your conviction is sustained, this Court might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth to doing with constancy those acts which will really help your fellow Americans and at the same time enhance you[r] personal well-being immeasurably, I say this Court might consider, and there is where I differ with your lawyer, a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651.
>
> So for all these reasons, in mitigation of sentence, and especially in light of the additional period of anguish to you since the verdict on the first trial, this

(Cont'd)

petitioner's character.[5] Instead, the judge imposed a tentative sentence of one year, which he committed himself to reconsider "if your conviction is sustained" on appeal.[6] Judge Cooper also said that in reconsidering that tentative sentence he

> might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth to

---

4 (Cont'd)

> court adjudges you guilty as charged and convicted, and it is adjudged that [you be committed to the custody of] the Attorney General or his authorized representative for imprisonment for a period of one year on each count to run concurrently with each other.

5 It is, in fact, unclear whether Judge Cooper was then actually in possession of the information he needed to explore those aspects of petitioner's character and to impose a sentence for more than "the present." Judge Cooper indicated that a pre-sentence report had been made available to him. CNM, p. 2. Moreover, the minutes of the subsequent argument on the motion to reduce sentence indicate that he intended "to ask the Probation Department to bring this matter up to date." CN Ex. No. 4, p. 44. On the other hand, the Court of Appeals states that what Judge Cooper thereafter received "was the first official probation report prepared by an officer of the probation service of the Southern District of New York". App. A, p. A-5, n. 4.

6 There can be no serious dispute over Judge Cooper's clear commitment to reconsider the sentence after the appeal was concluded. Otherwise, how can one explain his statement that "now is not the time to explore that phase. . . . " See note 4, *supra*. Surely no final sentence could be imposed without that critical phase – the consideration of affirmative aspects of petitioner's character – being fully explored. Thus, by explicitly deciding not to explore it then, Judge Cooper committed himself to explore it after the appeals.

> doing with constancy those acts which will really help your fellow Americans and at the same time enhance you[r] personal well-being immeasurably, I say this Court might consider, and there is where I differ with your lawyer,[7] a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651.[8]

Thus, what Judge Cooper communicated to petitioner was that he *would reconsider* the one-year sentence after the appeal was completed and that in so doing, he *might impose probation* upon "an impressively convincing showing" that petitioner had, in the interim, given "a hunk of yourself as well as your wealth" to charity. Indeed, the Court of Appeals below found as a fact that petitioner's ". . . attorneys interpreted the court's remarks to mean that if the conviction was sustained Birnbaum could, by following the guidelines in the court's remarks, avoid imprisonment and receive probation."[9]

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[7] Petitioner's trial lawyer had argued that petitioner was already rehabilitated and hence did not need further supervision. See *United States v. Birnbaum*, 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Inzer B. Wyatt, January 27, 1968, p. 5.

[8] See note 4, *supra*.

[9] App. A, p. A-4. See also, affidavit of petitioner's trial counsel (CNA, p. 4):

> Judge Cooper's statement at that time was taken by me as meaning that if, during the then forthcoming appeal from the conviction during which the one year prison sentence imposed on Birnbaum by Judge Cooper was to be stayed, Birnbaum should involve himself substantially in philanthropic activities, and if thereafter the conviction were affirmed, Judge Cooper would in all probability suspend the sentence and grant Birnbaum probation.

Since Judge Cooper had expressly referred to New York Supreme Court Justice Heller as a person who "believe[d] in" petitioner, the latter showed the sentencing minutes to Justice Heller and requested his advice. Justice Heller in turn spoke to Judge Cooper and told him that petitioner "was troubled in understanding how to comply with the Court's sentencing remarks." Judge Cooper replied:

> Well, if he doesn't know, why don't you guide him? You have had a great deal of experience in charitable endeavors. So why don't you guide him. If you want to help him, why don't you act as his unofficial probation officer and show him the ropes.[10]

Justice Heller agreed to do so and suggested three specific charitable organizations in which he thought petitioner might become active; Judge Cooper approved them. Thereafter, in his capacity as "unofficial probation officer," Justice Heller visited the leaders of the three organizations, informed them of the situation and arranged for interviews with the petitioner. They approved petitioner's participation in their activities. CNA, pp. 10-11.

It is undisputed that following petitioner's discussion with Justice Heller, his charitable and community activities became extensive. He devoted very substantial amounts of time to the organizations in which he had become interested, both those suggested by Justice Heller

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[10] CNA, pp. 10-11. The substance of the conversations between Justice Heller and Judge Cooper, and between Justice Heller and the petitioner, are set forth in an affidavit executed by the petitioner in support of a motion for a writ of error *coram nobis* or in the nature of *coram nobis* filed in this proceeding. The affidavit states that one of petitioner's attorneys showed the relevant portion of the affidavit to Justice Heller who verified the accuracy of the description of the conversations. *Ibid.*

and three other organizations petitioner himself had sought out. And it is clear that the extensive time and efforts which petitioner did devote to the various organizations was not perfunctory or mechanical. Rather, he called into play imagination, ability, personal sincerity, and a sensitivity to the nature of the problems confronting these organizations; in turn, he brought to bear both ingenuity and devotion in attempting to meet the organizations' needs. CN Ex. Nos. 2, 6.[11] Petitioner also contributed large sums of money to these charitable organizations and pledged substantial additional sums. CN Ex. No. 2.[12]

During this period petitioner met with Justice Heller several times a month so that the latter was familiar with petitioner's activities. Consequently, when the judicial colleagues again met at a later date, Justice Heller reported to Judge Cooper in substance as follows:

> As the unofficial probation officer of Birnbaum I would like to inform you that Birnbaum has become actively and financially identified

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[11] For example, in connection with his work witn the United Cerebral Palsy Association of Nassau County, one of the organizations approved by Judge Cooper in his discussion with Justice Heller, petitioner discovered the need for, and set in motion, a project to plan, construct and operate an institution to care for orphans afflicted with cerebral palsy. CN Ex. No. 6 (2). Petitioner also devoted a great deal of time and energy to St. Augustine's Episcopal School, which offers quality education to Negro children in the Bedford-Stuyvesant area of Brooklyn – including helping to meet its housing crisis, participating in the establishment of a part-time work and part-time schooling program for school dropouts, etc. CN Ex. No. 6(1). These, however, are but examples, and an *amicus curiae* brief which it is understood a number of the charities with which petitioner worked hope to be permitted to file, spells out the nature of petitioner's activities in greater detail.

[12] The Court of Appeals noted that petitioner "is said to have contributed $85,000 to various charitable organizations and pledged an additional $25,000." App. A, p. A-4, n. 2.

> with the three organizations we talked about and [is] putting his heart and soul into all their activities.

CNA, p. 11. Justice Heller also told Judge Cooper that petitioner had independently sought out and had become similarly identified with other charitable organizations. Judge Cooper replied: "That's good, that's fine." *Ibid.*

While petitioner was involving himself in the charitable activities described above, the other phase of the case proceeded. Petitioner appealed to the Second Circuit, as Judge Cooper had recognized he would (". . . you are on the way to appeal."). The appeal was argued by David W. Peck, Esq., former Presiding Justice of the Appellate Division, First Department, New York, who vigorously attacked Judge Cooper's conduct of the trial. The brief contended that the judge "took off in extemporaneous expression, gesturing and raising his voice as he did." [13] It further charged Judge Cooper with having "turned advocate for the prosecution" and characterized his charge to the jury as "egregiously unbalanced", "pious in expression and pernicious in emphasis", "virulently prejudicial", "obviously improper and prejudicial", "calamitous" and "grievously wrong". [14]

That this kind of attack on Judge Cooper's conduct of the trial was well within the proper range of advocacy in the circumstances is evidenced by the opinions of the Court of Appeals, both dissent and majority. Chief Judge Lumbard, in his dissent from the court's affirmance of the conviction, castigated Judge Cooper for his performance at the trial. He concluded that the charge ". . . went so far beyond the permissible limits of comment

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[13] Brief for Appellant at 47, *United States v. Birnbaum*, 373 F.2d 250 (2d Cir. 1966).

[14] *Id.* at 2, 45, 47, 66, 71, 72.

that it denied Birnbaum the fair trial to which every defendant is entitled". *United States v. Birnbaum*, 373 F.2d 250, 265 (2d Cir. 1966). He characterized part of the charge as being ". . . the stuff of which prosecutors make their summations; it ought not be the stuff with which judges charge juries." *Id.* at 267. He went on to say:

> . . . Here the trial judge stepped out of his role and was carried away by his advocacy into remarks which obviously were as extemporaneous as they were unnecessary. In many respects his arguments went beyond those of the prosecution and misstated the claims of the government. There can be no fair trial where the trial judge so abuses his power and puts his great and unquestioned influence in the scales against defendant. . . .
>
> Where the judge's charge contains so many irrelevant and improper arguments which clearly are prejudicial to the defendant we cannot say that the defendant has been fairly tried. In such a case the verdict should be set aside. It matters not how guilty the defendant may be nor how many juries have said so. The proceedings are tainted and should not stand.

Id. at 268-69.

Even the affirming majority in the Court of Appeals, though sustaining the conviction, had little good to say about Judge Cooper's conduct of the trial. It conceded that "we might not have expressed ourselves or ordered our charge as did the trial judge." *Id.* at 265.[15]

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[15] These references to Mr. Peck's arguments and the majority and dissenting opinions are in no way intended as reargument of pre-sentencing issues already finally decided, but rather are included to demonstrate that counsel could not in this case fully represent the legitimate interests of his client without raising serious questions about Judge Cooper's judicial performance.

After petitioner's conviction was affirmed and a subsequent petition for certiorari had been denied, petitioner filed a motion with Judge Cooper "for an order pursuant to Rule 35 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3651 reducing and suspending the execution of the sentence" imposed on April 1, 1966. CN Ex. No. 1. At that point two relevant intervening events had occurred since the "for the present" sentence had been imposed: (1) Petitioner had complied with Judge Cooper's admonition to "give a hunk of yourself as well as your wealth" to charity; and (2) petitioner's counsel had vigorously attacked Judge Cooper's performance at trial.

As to the first event, petitioner's compliance was established by an extensive showing. See pages 9-11, *supra*. Moreover, Justice Heller, petitioner's "unofficial probation officer," wrote Judge Cooper as follows:

> In carefully reviewing the whole picture, I am convinced that he has undertaken, and is indeed accomplishing, a remarkable job. If permitted to continue with these involvements, he should prove a useful, dedicated and humanitarian servant of our society.
>
> . . . .
>
> In summary, I would say that the defendant's activities, since he was sentenced, clearly indicate a genuine attempt on his part to rehabilitate himself along the lines suggested. You will have before you sufficient "predictive data" to guide you in your difficult decision. I bespeak for the defendant your gifted *intuition*, *insight* and *imagination* in evaluating the redemptive qualities now no longer "latent" but patently observable in the activities of the defendant, and I urge you to consider suspending his sentence.

CNM, pp. 11-12 (emphasis in original). Significantly, the Government's opposition to the motion for suspension of the prison sentence did not contest the evidence disclosing the time, devotion and money petitioner had devoted to charitable activities.[16] Rather, it emphasized the gravity of the crime of which he had been convicted (CN Ex. 3), and on oral argument the prosecutor also made much of petitioner's "refusal, constant, repetitive and insistent dogged refusal to face facts," *i.e.*, his refusal to admit his guilt (CN Ex. No. 4, p. 35). Both arguments, of course, were merely a reiteration of matters urged before Judge Cooper at the time he imposed his "for the present" sentence.

The second intervening event – the vigorous attack that had been made upon Judge Cooper's conduct of the trial by petitioner's counsel on the appeal – obviously was in the minds of counsel when the Rule 35 motion was presented to the judge. Mr. Peck, who had argued the case on appeal, did not appear. Instead, the motion was argued by former United States District Court Judge Simon H. Rifkind, Esq., and the latter evidently made the deliberate judgment that because of the appellate arguments he had much damage to repair. He characterized the trial as fair, spoke fulsomely of Judge Cooper's judicial qualities and apologized to Judge Cooper for Mr. Peck's appellate argument.[17]

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[16] Nor apparently could it have. It appears that until then only one of the numerous individuals with whom petitioner had worked on charitable activities had been spoken to by the probation service, and that individual only briefly by telephone. CNA, p. 15. See also p. 7, n. 5, *supra.*

[17] Mr. Rifkind said (CN Ex. No. 4, pp. 5-6):

> And here, your Honor, what I say I want to say with care. I say to you frankly and with the consent of counsel who preceded me, particularly counsel in the Court of Appeals, that zeal and the partisanship

(Cont'd.)

On the other hand, the prosecutor contended that the argument made by petitioner's counsel on appeal was itself evidence of *petitioner's* bad character. In a letter to Judge Cooper in opposition to the motion for reargument he stated:

> As we have noted consistently throughout this long proceeding, the punishment imposed by this Court upon this defendant was more than just: – it was compassionate. *Nothing more severely impeaches Birnbaum's present protestations of rehabilitation and good character than his continued refusal to recognize and appreciate the degree of human understanding so clearly evidenced by this Court's administration of the trial of Birnbaum's indictment,* by this Court's conscientious determination of a just and compassionate sentence, and by this

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(Cont'd.)

> which is characteristic of devotion to a client both, I think, combined to cloud counsel's judgment to some extent and in my opinion produced some utterances with respect to the conduct of the trial which, in my opinion again, were not justified by the record.
>
> I have told counsel that that was my judgment and he knows that I shall say it to you, and my saying it to you has his complete accord and approval, and he joins in it.
>
> I feel particularly confident in saying that since the Court of Appeals agreed with that. And, of course, that court does not lean on approbation, but it is so. And I suppose the Supreme Court's rejection of a petition for certiorari most likely proceeded on a similar appraisal of this trial.
>
> In short, this defendant has had a fair trial. He has had a trial at the hands of an American jury which was fairly selected. And he has had a trial under the direction of certainly an exceedingly experienced, learned and, more important than that, compassionate Judge.

> Court's painstaking consideration of Birnbaum's prior application for suspension of sentence and for probation.

CN Ex. No. 10, p. 2 (emphasis added).[18]

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[18] Varieties of this argument were made by the government at every stage of this case. In the subsequent argument before Judge Wyatt on *coram nobis*, the prosecutor made the following statement:

> I found that appeal to be the most naked, exaggerated and I use the word advisedly, vicious attack upon a judge's integrity in my short experience at the bar.
>
> It was stated in the brief on that appeal that Judge Cooper's charge to the jury was "pious in expression and pernicious in emphasis," and pernicious, as I read the dictionary, means intending to do evil and wicked.
>
> The Court of Appeals disagreed and the Supreme Court apparently disagreed. I certainly disagreed, your Honor, because I saw the charge and I saw the administration of the trial, and I speak really as a lawyer and not as an advocate, I saw it as an effort by Judge Cooper to bend over backwards to protect this defendant's rights.

United States v. Birnbaum, 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Inzer B. Wyatt, January 27, 1968, pp. 42-43. And in its brief on appeal, the government argued:

> It is virtually impossible to read Birnbaum's new argument as anything but an unwarranted, unsupported, and malicious attack upon a District Court Judge who has devoted his life to responsible and respected public service, while Birnbaum was amassing a personal fortune and participating in the corruption of an Internal Revenue Agent . . . . This claim of unfairness . . . appears motivated only by Birnbaum's desperate fear of a deserved punishment. That Birnbaum, for such a reason, would engage in such a vicious tactic in itself is substantial evidence that Birnbaum has not been rehabilitated.

Brief for Appellee at 8-9, *United States v. Birnbaum*, Docket Nos. 32063, 32064 (2d Cir., decided October 4, 1967).

Judge Cooper asked no questions at the argument on the motion to reduce sentence, and shortly after it was held filed a two-sentence memorandum which, although noting that he had "given long and careful consideration" to all the circumstances and arguments, merely stated without explanation: "After due deliberation, this court is satisfied the sentence imposed on April 1, 1966 should not be disturbed." App. A, p. A-12. The judge similarly disposed of the subsequent motion for reargument, which he granted and decided on the papers without hearing oral argument. App. A, pp. A-12–A-13.

Thereafter a motion was made before District Court Judge Inzer B. Wyatt for a writ of error *coram nobis* or in the nature of *coram nobis* for, *inter alia,* a hearing, including the taking of Judge Cooper's testimony, as to why petitioner's prison sentence should not be suspended and probation granted. CNA, pp. 1-2. The motion was denied. App. A, p. A-13. The denials of these motions were consolidated on appeal, and the United States Court of Appeals for the Second Circuit affirmed those denials on October 4, 1968, some eight months after it had heard argument.

REASONS FOR GRANTING THE WRIT

I.

THE SENTENCE IMPOSED ON PETITIONER BY THE TRIAL JUDGE WAS UNLAWFUL BECAUSE IT WAS TENTATIVE RATHER THAN "FINAL IN EVERY RESPECT" AS REQUIRED BY FEDERAL LAW

A. Federal law requires the trial judge to impose a sentence "final in every respect" at the time of the original sentencing

Federal law does not authorize a trial judge to impose a tentative sentence "for the present," as Judge Cooper did here. It is now well established that a federal trial

judge must impose a sentence which is "final in every respect," *United States v. Behrens*, 375 U.S. 162, 165 (1963). There is but one exception to this mandatory requirement: the judge may elect to proceed under 18 U.S.C. § 4208(b), which explicitly authorizes the imposition of a "tentative" sentence that "postpones action as to the final sentence." *Id.* at 165. Unless the trial judge invokes that special procedure with its attendant safeguards[19] – as Judge Cooper did not do here – the sentence he imposes after trial must be intended to be "final in every respect." *Ibid.* He may not, as Judge Cooper did, reserve judgment until a later time on concededly relevant factors in sentencing because he thinks that "now is not the time to explore" them. He must explore these factors at the time of the original sentencing and decide on a "final sentence" at that time. *Cf. Corey v. United States*, 375 U.S. 169, 176 (1963).

Nor does Rule 35 of the Federal Rules of Criminal Procedure weaken the requirement that the original sentence imposed by the judge must be intended to be a final one. Rule 35 provides, *inter alia*, that the trial judge may reduce a lawful sentence within specified periods of time. But that rule "cannot be used to impose a temporary sentence with the intent to take further action after additional information is received."[20] Indeed, this Court has explicitly said that "Rule 35 refers to the power of a court to reduce *a sentence which has already become final in every respect.*" *United States v. Behrens*,

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[19] For a discussion of these safeguards, see pp. 19-24, *infra*. In making the above argument, petitioner is not relying on any claim that Judge Cooper should have employed §4208(b) in this case. However, for an analysis of the availability to the judge of that provision, as well as other alternatives, see pp. 29-30, *infra*.

[20] Barkin, *Impact of Recent Legislation and Rule Changes Upon Sentencing*, 41 F.R.D. 494, 495 (1966).

supra, at 165 (emphasis added). The true office of Rule 35 proceedings – as contrasted with §4208(b) proceedings – is to permit the court to correct a lawful sentence imposed "on the basis of a misapprehension as to the history, character or physical or mental condition of the defendant."[21] Thus, a Rule 35 motion to reduce sentence is properly denied if "no facts [are] presented either by affidavit or on oral argument which were not before the Court at the time sentence was imposed." *United States v. Stromberg*, 179 F. Supp. 278, 280 (S.D.N.Y.), *aff'd*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959).[22] It seems clear, therefore, that unless a trial judge specifically invokes §4208(b), he may not properly impose a sentence "for the present," subject to reconsideration "if your conviction is sustained." He may not, as Judge Cooper did, engage in the improper practice of "dangling the possibility"[23] that he may subsequently reduce the tentative sentence to probation.

There are critical considerations of policy underlying the distinction between the authorization to impose a "tenative" sentence under §4208(b), and the requirement that all other sentences be deemed "final in every respect" at the time of their imposition. Proceedings under §4208(b)

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[21] Model Penal Code §7.08, Comment (Tent. Draft No. 2, 1954). The only cases in which it is accepted that Rule 35 might be used to modify a sentence which originally was tentative or conditional in nature have been instances of criminal contempt sentences, where the sentence is both coercive and punitive. *E.g., Brown v. United States*, 359 U. S. 41, 52, n. 15 (1959); *United States v. Levine*, 288 F.2d 272 (2d Cir. 1961).

[22] The Advisory Committee of the American Bar Association's Project on Minimum Standards for Criminal Justice has also suggested " . . . that it is inappropriate for the sentencing court to make a change in the imposed sentence unless new factors have been made known." American Bar Association, *Sentencing Alternatives and Procedures* 279 (Tent. Draft, 1967).

[23] App. A, p. A-10.

are circumscribed by important safeguards, two of which were considered in companion cases decided by this Court in 1963. In *Behrens v. United States, supra,* this Court held that a defendant must be afforded the right, "ancient in the law . . . to make a statement in his own behalf" before the judge decides whether to affirm or reduce the tentative sentence previously imposed, because "[i]t is only then that the judge's final words are spoken and the defendant's punishment is fixed." *Id.* at 165. This right of allocution does not apply, however, in proceedings under Rule 35. Thus, by imposing a tentative "for the present" sentence in the way the trial judge did here, he can obtain the advantages of a §4208(b) tentative sentence without affording the defendant the safeguards required under that section. That this clearly undercuts the policy underlying the *Behrens* decision has been recognized by the Legal Counsel of the Bureau of Prisons:

> It seems obvious that this [amendment to Rule 35] cannot be used to impose a temporary sentence with the intent to take further action after additional information is received without bringing the defendant back to court. This would be a clear contravention of the defendant's right to be present at the time final sentence is imposed and would fly in the face of the Supreme Court ruling in *United States v. Behrens,* 375 U.S. 162, 84 S.Ct. 295, 11 L. Ed. 2d 224, which held that a tentative sentence does not obviate the necessity of having the defendant present when the final sentence is imposed.[24]

Yet this "clear contravention" is precisely what occurred here. Judge Cooper did in this case "impose a

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[24] Barkin, *Impact of Recent Legislation and Rule Changes Upon Sentencing, supra* note 20.

temporary sentence with the intent to take further action." And he did "fly in the face of the Supreme Court ruling in *United States v. Behrens*" by not affording petitioner "an opportunity to make a statement to the judge in his own behalf" at the time when it is "of most importance" – when the "judge's final words are spoken and the defendant's punishment is fixed." *United States v. Behrens, supra,* at 165. The record in this case clearly establishes that petitioner was not offered this right of allocution when "the sentence that counts" was pronounced. *Id.* at 166.[25]

There is another – and perhaps even more important – safeguard that attaches to proceedings under §4208(b) but that is absent when the judge imposes the kind of tentative sentence at issue here. That safeguard was the subject of this Court's decision in *Corey v. United States,* 375 U.S. 169 (1963). The Court held there that when a judge imposes a tentative sentence under §4208(b), the defendant has the "option" of taking his appeal "after either the first or the second sentence." *Id.* at 173. The reason given by the Court for why the defendant must be given the option of appealing "after final termination of the trial court proceedings" – *i.e.,* after the final rather than the tentative sentence has been imposed – is critically relevant to the issues raised by this case. The Court attributed conclusive significance to the fact that "a defendant might think, rightly or wrongly, that the trial court's knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." *Id.* at 175.[26] Thus, the decision in

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[25] There is, of course, no requirement that a defendant ask to speak in his own behalf. The trial judge must affirmatively offer him the opportunity to do so. *Gadsden v. United States,* 223 F.2d 627, 632-33 (D.C. Cir.), *cert. denied,* 350 U. S. 949 (1955).

[26] Mr. Justice Harlan, in his dissenting opinion in *Corey,* did not, in any way, suggest approval of the trial judge's being adversely influenced by an appeal. Indeed, he referred to this as "maladministration of criminal justice." 375 U. S. at 179.

Corey was designed, in substantial part, to prevent the possibility that a defendant might be deterred from exercising his right to appeal by the fear, whether well or poorly grounded, that his decision to appeal might incline the judge against reducing the original tentative sentence.

Yet this danger – now eliminated for proceedings under §4208(b) – continues to exist so long as judges may employ tentative sentences of the kind imposed by Judge Cooper in this case. Petitioner here had no option to delay his appeal until after Judge Cooper had spoken his "final words." He had to "show his hand" while the sentence was still tentative and subject to reconsideration; and this enabled the trial judge to consider not only the fact that an appeal had been taken *but the nature of the appeal as well,* before he imposed his final, fixed sentence. This practice of tentative "for the present" sentencing dramatically undercuts the critical policy relied on by this Court in *Corey*:

> Long-accepted and conventional principles of appellate procedure require recognition of the defendant's right to await the imposition of final sentence before seeking review of the conviction. That is the general rule. . . . We find nothing to indicate that Congress intended to depart from that rule in enacting §4208(b).

Id. at 176. Neither is there any indication that Congress intended to depart from this long accepted and conventional principle by allowing trial judges to impose the kind of tentative sentence at issue here, a practice which has the effect of forcing criminal defendants into deciding whether (and how) to appeal before final sentence has been imposed.

Indeed, the policy underlying this Court's decision in *Corey* – that nothing should be done to deter the defendant from exercising his full appellate rights – has been considerably strengthened by recent judicial opinions

condemning the imposition of any pressure, whether overt or subtle, on the defendant to forego exercise of his appellate rights. In the leading case of *Patton v. North Carolina,* 381 F.2d 636 (4th Cir. 1967), *cert. denied,* 390 U.S. 905 (1968), a trial judge's increase of sentence on retrial, following a successful appeal from a prior conviction, was held unconstitutional. Judge Sobeloff, writing for the court, emphasized that "the risk of a greater sentence . . . may prevent defendants who have been unconstitutionally convicted from attempting to seek redress." *Id.* at 639. The possibility of a harsher sentence after appeal "frustrates the pursuit of post-conviction remedies provided by the State. Courts should be especially vigilant to protect access to these remedies, rather than strive to fashion a doctrine inhibiting the exercise of the right to review." *Id.* at 643.

The First Circuit recently arrived at a similar conclusion. In remanding for resentencing a case in which a trial judge had imposed a harsher sentence on retrial, Chief Judge Aldrich said that a defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." *Marano v. United States,* 374 F.2d 583, 585 (1st Cir. 1967). The court held that "there must be repose" as to the sentence or else there "might well be substantial deterrents to a decision to appeal." *Ibid.*

The *Patton* and *Marano* cases thus hold that a trial judge must be denied the power to increase the sentence of a *successful* appellant, so as not to deter the right to appeal. It is equally important to deny the trial judge the power to manipulate the sentence of an *unsuccessful* appellant. Since no defendant knows, at the time he decides whether and how to appeal, if he will be successful or unsuccessful, the practice employed by Judge Cooper can be just as effective – and hence as illegal – a

deterrent to a defendant's right to take a vigorous appeal as the practice condemned in *Patton* and *Marano*.[27]

The issue raised by the *Patton* and *Marano* cases – the power to use the sentence to deter the successful appellant – is now before this Court in *Pearce v. North Carolina*, 397 F.2d 253 (4th Cir.), *cert. granted*, 21 L.Ed. 2d 114 (1968) (No. 413). Petitioner herein submits that this case represents the opposite side of the *Pearce* coin: whether the trial judge should be denied the power to use the sentence to deter the unsuccessful appellant.

B. The original sentence imposed on petitioner in this case was tentative rather than final, and the decision below sustaining that sentence is in conflict both with this Court's decision in Corey v. United States, and with decisions of the First, Fourth and Fifth Circuits.

There can be little doubt that the original sentence imposed on petitioner by Judge Cooper was not intended to be "final in every respect." *United States v. Behrens, supra.* It was explicitly stated to be only "for the present," since the trial judge did not regard that as the appropriate time to consider admittedly relevant affirmative aspects of petitioner's character ("now is not the time to explore that phase"). Indeed, the Court of Appeals below seemed to concede that the sentence was not intended to be "final in every respect." It found as a fact that "Judge Cooper unambiguously reserved the power to reassess the situation and decide whether, after Birnbaum's conviction became final, probation would be inappropriate in light of all relevant factors, including that of appellant's

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[27] This Court has recognized – in a different but related context – the impropriety of distinguishing between successful and unsuccessful criminal litigants. *See Commissioner v. Tellier*, 383 U.S. 687 (1966).

behavior while his appeal was pending." App. A, p. A-9. It would be difficult to imagine a more direct violation of the spirit – indeed the letter – of this Court's decision in *Corey v. United States, supra,* which recognized the "defendant's right to await the imposition of final sentence before seeking review of the conviction" in order to avoid any possibility that "the trial court's knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." 375 U.S. at 175. In this case, Judge Cooper, by requiring petitioner to appeal from a tentative rather than a final sentence, arrogated to himself powers specifically denied to federal judges by this Court's decision in *Corey*: the power to postpone final imposition of sentence until after the defendant has completed his appeal; the power to pass judgment on the nature of the defendant's appeal; and the power to have the defendant's course of action in the appellate process "adversely influence the court's discretion in imposing final sentence." *Id.* at 175.

The policy considerations underlying the *Corey, Patton, Pearce* and *Marano* line of cases are particularly compelling in a case like this. Judge Cooper was fully aware that the critical appealable issue involved his own judicial performance at the trial.[28] He knew that if defendant appealed the conviction it would be on grounds that might reflect adversely upon his handling of the trial.

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[28] Much of the sentencing proceeding itself was taken up with discussion about the judge's instructions. Indeed, the Judge himself made the following comment:

> There has been an understandable amount of emphasis placed on the Court's charge, and I am not here to uphold it in any way except to say that if I were to recharge the jury today, I would use every one of those words that I actually used.

United States v. Bimbaum, 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Irving Ben Cooper, April 1, 1966, p. 2157.

It is particularly dangerous – and unseemly – for a trial judge to "dangl[e] the possibility" of reducing the sentence after appeal in a case where the appeal is certain to involve that very trial judge's performance at the trial.

Not only did the sentence imposed by Judge Cooper in this case undercut important decisions of this Court and of the First and Fourth Circuits, it is also in direct conflict with a recent decision of the Fifth Circuit. In this case, Judge Cooper refused to consider affirmative aspects of petitioner's character at the time of the original sentencing *because* petitioner continued to claim his innocence after the jury verdict ("for you have not accepted the jury's verdict"; "You protest your innocence and you are on the way to appeal"). This approach to sentencing was specifically disapproved in *Thomas v. United States,* 368 F.2d 941 (5th Cir. 1966). In that case,

> . . . prior to imposing sentence the judge advised the defendant that the judge had no doubt whatsoever as to his guilt, and that if he then confessed his guilt the court would take that into account in the length of sentence to be imposed; while, on the other hand, if he persisted in his denial that he participated in the crime, the court would also take that into account. The defendant chose to persist in his claim of innocence, and the court sentenced him to imprisonment for the maximum term permitted by law.

Id. at 942. The Fifth Circuit, in an unanimous opinion by Judge Rives, vacated the sentence, holding that it was improper for a federal court to exact from a defendant "a judicially imposed penalty for exercising his constitutionally guaranteed rights" to assert his innocence and to appeal. *Id.* at 946.

In this case, as in *Thomas,* the trial court imposed a judicial penalty on defendant for continuing to assert his

innocence. In *Thomas*, the penalty was a harsher sentence; in this case, it was the sentencing judge's refusal to consider the affirmative aspects of petitioner's character and his refusal to impose a final sentence before the appeal.[29] The Court's reasoning in arriving at its conclusion that a judge may not penalize a defendant for refusing to concede guilt is most persuasive and relevant to the issues raised by petitioner here:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

Id. at 945. Petitioner here was in precisely the same situation as *Thomas*. He too had "not been finally and

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[29] In the *Thomas* case, the court found that the defendant had been prejudiced even though the judge's statement did not induce him to abandon his right to appeal and to assert his innocence. The court's statement of that point is most relevant to the issues raised in this case:

> Since Thomas chose the second "if," he did not in fact abandon his Fifth Amendment rights, and he retained unimpaired his post conviction remedies. It may then be argued that he came through his dilemma unscathed. True, he received the maximum sentence, but perhaps the district court already had that in mind, and was simply giving Thomas a last minute chance to repent and thereby to secure a reduction of that sentence.

368 F.2d at 945. The court rejected that reasoning and held that defendant had been prejudiced. Similarly here, even though petitioner did not forego his right to appeal, he was prejudiced in that the judge refused to consider affirmative aspects of his character because of his refusal to accept the jury's verdict.

irrevocably adjudged guilty" at the time Judge Cooper charged him with not having "accepted the jury's verdict." Had he accepted the jury's verdict, he too would have foregone the rights enumerated in the Fifth Circuit's opinion. And no judge should be able to impose a judicial penalty on a defendant for his refusal to forego such important rights.[30] The penalty imposed here – the sentencing judge's refusal to consider relevant affirmative aspects of petitioner's character and his unwillingness to impose a final sentence before appeal – was just as real to petitioner as the increased punishment imposed upon Thomas. Indeed, had Judge Cooper considered, and given appropriate weight to these affirmative factors at the time he imposed the original sentence, it must be assumed that the sentence would have been less than the one actually imposed (since a sentence is supposed to reflect the affirmative as well as the negative aspects of defendant's case). And if this is so, as petitioner submits it is, then his penalty was precisely the same as that imposed on Thomas: a harsher criminal sentence.

It is petitioner's contention, therefore, that this case is an appropriate one for the exercise of this Court's discretionary certiorari jurisdiction. The decisions below cannot be reconciled – in holding, in language, or in spirit – with the decisions of this Court in the *Corey* and *Behrens* cases, or with the decisions of the First, Fourth and Fifth Circuits in the *Marano, Patton, Pearce* and *Thomas* cases. Accordingly, petitioner asks this Court to grant certiorari and hold that Federal law does not authorize a federal trial judge to impose the kind of sentence employed by Judge Cooper in this case. This Court should require federal trial judges – for important reasons of law and policy – to impose sentences that are "final in every

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30 Nor should the government be permitted to urge, as it did repeatedly in this case (see pp. 15-16, *supra*), that petitioner should be punished because he refused to concede his guilt after trial but before appeal.

respect," before and not after defendant has taken his appeal.

If this Court so rules, there would still be a number of legitimate ways for a sentencing judge to accomplish whatever beneficent purposes Judge Cooper had in mind in this case. He could, for example, delay the imposition of the sentence until the information he thought necessary became available. Such delay does not carry with it the dangers condemned in the *Corey* case and present in the practice under challenge here; when sentencing is simply delayed, the defendant does not have to "show his hand" concerning the appeal until *after* the judge has imposed final sentence.[31] Alternatively, a sentencing judge might invoke 18 U.S.C. §4208(b) with its considerable safeguards for the defendant.[32] And if the judge wanted

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[31] Delay in imposing sentence is appropriate so long as it is not "unreasonable" and so long as it is "for a proper purpose in the ordinary process of handling the case." *Lott v. United States*, 309 F.2d 115 (5th Cir. 1962), *cert. denied*, 371 U. S. 950 (1963). "Obviously, the most legitimate circumstance [justifying delay] is the conduct of a presentence investigation to aid the court in reaching a just disposition." 8 J. Moore, *Federal Practice* ¶ 32.02[2], at 32-8 (2d ed. 1968).

[32] There is nothing in the language or legislative history of §4208(b) which requires that the defendant be *confined* while information about him is being gathered. *Cf.* Bennett, *Evaluation of the Offender by the Bureau of Prisons*, 26 F.R.D. 331 (1959). The statute says nothing about confinement; it simply allows the defendant to be committed to the "custody of the Attorney General." Such custody may surely include the supervision of the probation service, or other similar agencies that do not require total confinement. In this day of increased reliance on outpatient and community diagnostic services, it would be a step backward for the courts to construe §4208(b) to require confinement even in cases where non-institutional evaluation would do just as well or better.

the defendant to become involved in charitable work, he could impose probation pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Had Judge Cooper imposed probation in this case, he would have been required to define the conditions with some precision.[33] Petitioner would have had the right to appeal conditions such as giving substantial sums to charity, and his challenge would have found substantial precedential support.[34] Most significantly, a prison sentence could not be imposed without a hearing at which a specific and intentional violation of a valid condition would have to be established and the defendant "apprised of the grounds on which such action is proposed." Rule 32(f), Federal Rules of Criminal Procedure.[35]

Each of these alternatives afford the defendant substantial safeguards designed to protect him against the dangers inherent in tentative, "for the present" sentences. But Judge Cooper chose an impermissible alternative that denied to petitioner the safeguards specifically required by Congress and the Courts. That kind of judicial circumvention should not be tolerated by this Court.

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[33] *Butler v. District of Columbia*, 346 F.2d 798 (D.C. Cir. 1965).

[34] See cases cited in Note, 59 Colum. L. Rev. 331, 337 (1959). *See, e.g., United States v. Rosner*, 161 F. Supp. 234 (S.D.N.Y. 1958); *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945); *Karrell v. United States*, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U. S. 891 (1950).

[35] *Compare, e.g., Hollandsworth v. United States*, 34 F.2d 423, 428 (4th Cir. 1929).

II

THE CIRCUMSTANCES OF THIS CASE CAST SUCH DOUBT UPON THE INTEGRITY OF THE APPELLATE PROCESS THAT THEY CALL FOR CORRECTIVE ACTION PURSUANT TO THE SUPERVISORY AUTHORITY OF THIS COURT OVER THE ADMINISTRATION OF CRIMINAL LAW IN THE FEDERAL COURTS

Improper motivation of a sentencing judge is "characteristically a force of such low visibility" that it is "an impossible task for a prisoner to prove." *Patton v. North Carolina, supra,* at 641. It is therefore assumed that if the circumstances here establish a substantial likelihood – indeed, even the appearance – that Judge Cooper's refusal to reduce petitioner's sentence to probation was in retribution for the arguments made by his counsel on appeal, that is sufficient to justify the corrective exercise of the supervisory powers of the federal appellate courts.[36]

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[36] There is substantial judicial support for not requiring a defendant to prove that a trial judge was, in fact, improperly motivated. The *Patton* and *Marano* cases, *supra,* establish an objective, rather than subjective, test in specific recognition of the impossibility of ever establishing motive with certainty. As the District Court observed in *Patton*:

> To put upon the prisoner the burden of proving improper trial court motivation is like granting him the opportunity to move Parnassus with a spoon.

Patton v. United States, 256 F.Supp. 225, 235 (W.D.N.C. 1966).

The Court of Appeals in *Patton* also recognized that it is "most distasteful for federal courts to pry inside the sentencing judge's motivations to ascertain whether vindictiveness plays a role." Accordingly, that court felt it necessary to establish an absolute rule because of the "danger inherent in [such] a system," and also because even "the *appearance* of improper motivation is a disservice to the administration of justice." 381 F.2d at 641. Nevertheless, petitioner also argues that if Judge Wyatt had not erroneously denied the *coram nobis* petition, it may have been

(Cont'd.)

The circumstances of this proceeding clearly create such an appearance and do establish the existence of such a substantial likelihood. As has already been demonstrated, there were but two intervening factors between the time Judge Cooper said he might impose probation and his decision not to do so: (1) petitioner's unrebutted showing that he relied on and complied with the judge's admonition relating to charity; and (2) the nature of the appeal argued by his counsel. Against this background, the unexplained denial of probation creates the inescapable inference that the decision to deny the motion to reduce and suspend sentence was influenced by the second factor – the argument made by petitioner's counsel on appeal. *See Shear v. Boles,* 263 F.Supp. 885, 860 (N.D. W. Va.), *rev'd,* 391 F.2d 609 (4th Cir. 1967). The inference is strengthened by other evidence as well. The apology which Mr. Rifkind made to Judge Cooper, for example, both on his behalf and on behalf of Mr. Peck, made it clear that both of these experienced attorneys considered the appellate argument made by the latter a factor involved in the decision on the Rule 35 motion.[37] Moreover, government counsel requested Judge Cooper to take the appellate argument into account in determining whether to reduce and suspend the sentence.[38] In these circumstances, the already-existing inference that the refusal to reduce the sentence to probation "was in reaction to the defendant's temerity in attacking the original conviction," *Patton v. North Carolina, supra,* at 641, becomes compelling. Nor did Judge Cooper's memorandum opinion dispel the inference. He merely stated that his decision not to disturb the originally imposed sentence

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(Cont'd.)

possible to establish as a fact that Judge Cooper's decision not to grant probation was motivated by the appellate arguments critical of him.

[37] See note 17, *supra.*

[38] See pp. 15-16, and note 18, *supra.*

was reached after "long and careful consideration" and "[a]fter due deliberation."[39] In this setting, not "even the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 15 (1954), has been satisfied. Indeed, this Court has observed that

> . . . fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956). See *Saldana v. United States*, 365 U.S. 646 (1961). In this case, however, petitioner's claim is anything but "irrational or perverse." For the facts and the express position of government counsel combine to indicate that petitioner was punished for his counsel's wholly proper arguments on appeal.

Even if this Court should not agree that petitioner has made a sufficient showing of punitive intent, the circumstances here involved call for the exercise of this Court's supervisory power, to protect the appellate processes in federal courts. The exercise of the supervisory power "does not depend upon the showing of prejudice in an individual case." *Ballard v. United States*, 329 U.S.

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[39] App. A, p. 12. His memorandum on the motion to reargue (App. A, pp. 12-13) was equally enigmatic. He said no more than that he had given a great deal of thought to the matter and had estimated "the extent of defendant's activities since imposition of sentence and weighed the justice to community and defendant alike."

In other circumstances, the reference to "the extent of defendant's activities since imposition of sentence" might be interpreted only as a reference to petitioner's charitable activities. However, the phrase is in fact ambigious. In view of government counsel's contention with respect to the motion to reargue – that what was argued by petitioner's counsel on the appeal was evidence of *petitioner's* bad character – the reference may represent acceptance of that contention. In *Marano v. United States, supra*, at 585-86, n. 3, the First Circuit stated: "If the [trial] court is taking the exceptional step of increasing a sentence following retrial, we suggest that in this circumstance its ground for doing so should be made affirmatively to appear." Petitioner submits that in the exceptional circumstances of this case as well, the trial judge should not be permitted to rely on grounds that he has not been willing to disclose.

187, 195 (1946). Instead, the Court has "an obligation that goes beyond the conviction of the particular defendant before the Court." *Sherman v. United States*, 356 U.S. 369, 380 (1958) (concurring opinion). This Court is not likely to be presented with a record which illustrates more clearly the ability of a trial judge to use his sentencing powers as an inhibitant to the appellate process.

The Court's concern for preserving the right of appeal and – to the extent possible – insulating what counsel argues on appeal from influencing the sentencing process has already been set forth above. The record in this case, however, discloses a practice which, if not corrected, will so inhibit counsel on appeal as to deny convicted defendants both due process and the effective assistance of counsel.

This danger can best be understood by putting oneself first in the place of petitioner's counsel and then in the place of counsel who in the future may be similarly situated. In this case, responsible counsel made the judgment that the principal ground for appeal from petitioner's conviction was the prejudicial nature of the judge's charge. Accordingly, the point was argued vigorously on appeal.[40] And Chief Judge Lumbard's dissent discloses, if nothing else does, that as a matter of appellate advocacy, counsel were justified in arguing as they did. At the same time petitioner followed the course of action which he and his counsel were given to believe by Judge Cooper could save petitioner from a jail sentence, even if the conviction should be affirmed. Yet he was not saved from that sentence, and the only apparently relevant intervening factor

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[40] See Brief for Appellant, *United States v. Birnbaum*, *supra* note 13. In fact, 21 pages of the argument contained in that brief were devoted to the charge, while the remaining four pages were devoted to a question of evidence.

which explains this is the criticism of the judge's conduct of the trial in the appellate argument.

Certainly in similar future circumstances equally experienced and responsible counsel will be given pause. They will have to weigh two competing considerations, which they should not have to weigh. The first would be to make an appellate argument which in their judgment has merit and which they believe their obligation to their client requires them to argue – even if it does reflect discredit on the trial judge. The second is not to make such an argument because if it ultimately proves to be unsuccessful not only is it likely to influence the trial judge's exercise of discretion when a subsequent Rule 35 motion is made, but government counsel may expressly contend that the very fact that the argument was made justifies such adverse action by the judge.

Neither criminal defendants nor their counsel should be put to such a choice. If counsel abandons the argument, much of what was determined in *Douglas v. California*, 372 U.S. 353 (1962), about the essentiality of the aid of counsel on appeal becomes a mockery. Counsel appears but remains mute on a vital question affecting his client's rights. If counsel makes the argument, he imposes upon his client a risk that should not be imposed.[41] Accordingly, the implications of this case cast such grave doubt upon the integrity of the judicial process and pose such substantial dangers to the administration of justice, that it is highly appropriate for this Court to take corrective action pursuant to its supervisory powers.

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[41] The Court of Appeals also approved Judge Cooper's invitation to petitioner to take "a calculated risk" in an "effort to persuade the sentencing judge that he should not suffer confinement." App. A, p. A-10. It surely is not proper for the trial judge to put the defendant in this kind of position, particularly at a time when it is inevitable that one of the elements that would enter into any defendant's calculations would be whether and how to take the appeal.

III

THE REMEDY

Petitioner recognizes that if this Court decides to grant certiorari and either vacates the unlawful tentative sentence imposed by Judge Cooper or determines that the circumstances call for the exercise of its supervisory jurisdiction with respect to the judge's failure to reduce the one year prison sentence to probation, there would be a number of possible dispositions available to it. For this Court is empowered to dispose of cases "as may be just under the circumstances."[42]

In petitioner's view, the most equitable and effective disposition would be to remand to the District Court with directions to impose a probationary sentence. This would be appropriate for two reasons. First, it would be the only way for this Court to be certain that petitioner is not being punished for his appeal. If petitioner had not appealed and if the judge had concluded at the

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42 The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. §2106. *Cf. Yates v. United States,* 356 U. S. 363 (1958). We assume, of course, that it would be improper for any trial court to impose a sentence in excess of the one year tentative sentence imposed by Judge Cooper. To permit such an increase in sentence would be to impose an absolute deterrent against any challenges to unlawful or improper sentencing processes. Even if the tentative one year sentence was invalid – as petitioner argues it was – it surely sets the outer limit for constitutionally permissible sentences. *See Patton v. North Carolina, supra; Pearce v. North Carolina, supra.*

time of the initial sentencing that "now is . . . the time" to consider the affirmative aspects of his character relevant to the imposition of sentence, petitioner's sentence would certainly have been less than a year, and most probably probation. For it must be assumed that – granted, as Judge Cooper did, the existence of such affirmative aspects of character – the sentence which was imposed was greater than what would have been imposed had they been considered. But petitioner did appeal, and the circumstances point strongly to the likelihood that Judge Cooper's refusal to reduce sentence was in retribution for what was argued on appeal. These facts simply cannot be erased. Therefore, the only way of assuring that the sentence ultimately imposed upon petitioner is not in retribution for his counsel's appellate argument would be to have him receive the sentence he likely would have received if he had not appealed.

There is substantial judicial authority for this approach in the analogous area of probation. When a trial judge imposes a condition of probation, the defendant may challenge that condition; if the reviewing court agrees with defendant's challenge, it will frequently strike the unlawful condition but affirm the sentence of probation. *See, e.g., United States v. Taylor,* 305 F.2d 183, 188 (4th Cir.), *cert. denied,* 371 U. S. 894 (1962); *Karrell v. United States,* 181 F.2d 981 (9th Cir.), *cert. denied,* 340 U. S. 891 (1950). This is a recognition of the hard fact that to do otherwise – to remand the case for de novo sentencing – would discourage defendants from challenging unlawful conditions of probation out of fear that if they "win" their point, their reward may be the imposition of a jail sentence on remand. Moreover, this Court has explicitly recognized the dangers of not giving litigants the fruits of their judicial victories. In *Stoval v. Denno,* 388 U. S. 293 (1967), the Court gave as one of its reasons why defendants "must be given the benefit" of the rules established in their cases "the possible effect upon the

incentive of counsel to advance contentions requiring a change in the law."[43]

Here, petitioner has challenged an unlawful sentence, or at least wholly improper practices affecting sentencing. If this Court remands for de novo sentencing, petitioner will have won his legal point, but lost his case, since the trial judge would still be free to reimpose the one year sentence. Such a result would work more than an injustice on the litigant in this case; it would effectively serve to discourage defendants from challenging sentencing practices of the kind at issue here.

Second, elements of ordinary fairness dictate that petitioner should be placed on probation. As the Court of Appeals apparently conceded, petitioner, as well as his lawyers and the charities in which he became active and which came to rely upon him, all understood Judge Cooper's comments at the original sentencing proceeding, as reinforced by his subsequent discussions with Justice Heller, to mean that petitioner would not be imprisoned if he followed the course of involvement in charitable activities recommended to him by Judge Cooper.

There can be little doubt that if the words Judge Cooper used connoted an express conditional promise to grant probation and petitioner followed the course of action upon which such a promise had been conditioned, the promise would be enforced.[44] Elemental standards

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[43] 388 U. S. at 301. See also Mishkin, *The Supreme Court, 1964 Term (Foreword: The High Court, The Great Writ, and the Due Process of Time and Law)*, 79 Harv. L. Rev. 56, 60-61 (1965).

[44] *See, e.g., Machibroda v. United States*, 368 U. S. 487 (1962); *Shelton v. United States*, 356 U. S. 26 (1958); *Walker v. Johnston*, 312 U. S. 275 (1942); *United States v. Taylor*, 303 F.2d 16[illegible] (5th Cir. 1962); *Hassell v. United States*, 287 F.2d 646 (9th Cir. 1961); *United States v. Gilligan*, 256 F.Supp. 244 (S.D.N.Y. 1966).

(Cont'd.)

of fairness have long dictated that the sanctity of judicial promises be enforced by the courts. This has been illustrated particularly in circumstances where a plea of guilty is obtained by what may be construed to be a judicial promise. In such circumstances "[f]undamental fairness as a concept of due process of law, requires" that the promise be honored. *United States v. Gilligan*, 256 F.Supp. 244, 249 (S.D.N.Y. 1966).

The words used by Judge Cooper in this case were, in fact, ambiguous. His statement that he "might consider" probation if petitioner complied with the charity admonition can reasonably be interpreted to mean (1) that he would impose probation but only if petitioner complied, or (2) that he might refuse to impose probation even if petitioner complied. Petitioner maintains that the first reading is the more reasonable and just. But even if this Court does not agree – even if it concludes that Judge Cooper did not use words of contract – the circumstances following the utterance of these words require that they be treated as binding.

After the judge had imposed sentence and prior to his action on the Rule 35 motion, he expressed approval of petitioner's activities by approving the specific charitable organizations with which petitioner should become affiliated and by approving the general course of petitioner's charitable activities as subsequently reported to him by the "unofficial probation officer." Therefore, if petitioner and his attorneys had grounds to interpret Judge Cooper's remarks when he imposed

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[44] (Cont'd.)

In *Butler v. District of Columbia, supra* note 33, the District of Columbia Circuit went even further. In that case, involving a whimsical and improper condition for suspension of sentence (to write an essay on respect for police), a unanimous court reversed and remanded with directions to "order the information dismissed, a disposition we deem" just under the circumstances. *Id.* at 799.

sentence, as the Court of Appeals found they in fact did, ". . . to mean that if the conviction was sustained Birnbaum could, by following the guidelines in the court's remarks, avoid imprisonment and receive probation," the judge certainly subsequently gave them additional strong support for that view.

Therefore, even if the language initially used by Judge Cooper did not amount to a literal promise, that language, taken together with his subsequent appointment of the "unofficial probation officer" and his subsequent expression of approval of petitioner's activities, combined to create a situation in which reasonable men could and did honestly believe that the judge would in fact do what he originally said he might do. In such a situation, considerations of fundamental fairness should be given the same force that they are given when a promise is literally made.[45] Those considerations make it inappropriate to conclude, as did the Court of Appeals, that petitioner took "a calculated risk" when he undertook the charitable activities suggested by Judge Cooper,[46] and then to speculate about the reasons for the judge's ultimate decision.[47]

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[45] Thus it has been held that a plea of guilty may be withdrawn if it was made upon the basis of a likely misapprehension about a judge's commitment concerning the sentence to be imposed, rather than upon an express promise from the judge. *Commonwealth v. Scoleri*, 415 Pa. 218, 202 A.2d 521, 526, 537-38 (1964). *See also Saldana v. United States*, 365 U.S. 646, 647 (1961).

[46] App. A, p. A-10.

[47] It *appears* that in the judge's eyes appellant did not make the "impressively convincing showing" that the judge felt was necessary before he could grant probation. Also, the judge did not *seem to feel* that the best interest of the public would be served by granting appellant probation.

App. A, p. A-11 (emphasis added).

The unequal positions of a judge and one accused but not yet found guilty – "one with power to commit to prison and the other deeply concerned to avoid prison," *United States v. Gilligan, supra,* at 254 – is well recognized. Even more unequal is the relationship of a judge to one already convicted but not yet sentenced. Certainly in such a situation a judge should not use his awesome power to grant or withhold liberty to impose "a calculated risk" upon a convicted defendant. Moreover, in this case that awesome power was used to impose effective controls over the life of a convicted defendant for a period of over eighteen months. *Cf. Weems v. United States,* 217 U.S. 349, 364, 382–83 (1910). It is true that the power operated to direct petitioner into good works – and he does not regret them. Nevertheless, the very fact that the judge's power was so employed emphasizes the requirement that judicial commitments – whether express or implied – be honored.[48]

In light of all the circumstances, therefore, it is petitioner's view that it would "be just" to remand the case to the District Court with directions to impose a sentence of probation.[49]

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[48] Indeed, if what was involved here was not a commitment, it had so whimsical an aspect as to bring into question whether what did occur constituted a violation of Canon 21 of the Canons of Judicial Ethics, which provides in part: "Though vested with discretion in the imposition of mild or severe sentences [a judge] should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence." If it did constitute such a violation, there exists added reason for the exercise of the supervisory power.

[49] Another possible disposition would be for this Court to issue an order instructing the trial judge to impose probation *unless* it is established that petitioner failed to comply with Judge Cooper's

(Cont'd.)

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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December 3, 1968

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[49] (Cont'd.)
"condition" concerning charity. But since it appears beyond dispute that no finding of such failure could be made, it would seem unnecessary to do this. If this Court decides to remand with such an order, petitioner requests that the case be remanded to a judge other than Judge Cooper. This Court has, on previous occasions, remanded cases to "a different judge" in the "interests of justice and in the exercise of the supervisory powers of this Court." *Calvaresi v. United States,* 348 U. S. 961 (1955). See also *Offutt v. United States,* 348 U. S. 11, 17-18 (1954); *Cooke v. United States,* 167 U. S. 517 (1924); *Blunt v. United States,* 244 F.2d 355, 368 (D.C. Cir. 1957). Such action is particularly appropriate where, as in this case, the trial judge has become "personally embroiled with petitioner." *Offutt v. United States, supra,* at 17.

APPENDIX A

Opinions Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 378-379—September Term, 1967.

(Argued February 7, 1968 Decided October 4, 1968.)

Docket Nos. 32063-32064

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAUL I. BIRNBAUM,

Appellant.

Before:

WATERMAN and FEINBERG, *Circuit Judges,*
BARTELS, *District Judge.**

Appellant who was sentenced to concurrent terms of imprisonment of one year, United States District Court for the Southern District of New York, Cooper, *J.*, moved to have his sentence reduced and suspended. The motion was denied, as was also a motion to reargue it. Appellant then applied for a rule to show cause why a writ of *coram nobis* should not issue in order to have the sentencing judge's determinations reviewed and so as to have an evidentiary hearing at which evidence could be adduced with reference to the purpose of certain remarks made by the judge when he imposed sentence. This application was denied, United

* Of the Eastern District of New York, sitting by designation.

States District Court for the Southern District of New York, Wyatt, *J.* Appeals were taken from the orders of Judges Cooper and Wyatt and were consolidated for argument. The orders are affirmed.

PETER FLEMING, JR., DOUGLAS S. LIEBHAFSKY, Asst. United States Attorneys, ROBERT M. MORGENTHAU, United States Attorney, *for Appellee.*

ARNOLD BAUMAN, MORTON SCHLOSSBERG, CHRISTY, BAUMAN, FREY & CHRISTY, JEROME LEWIS, New York City, *for Appellant.*

WILLIAM J. VANDEN HEUVEL and CHARLES G. MOERDLER, New York City, *for St. Augustine's Episcopal School, et al., Amicus Curiae.*

WATERMAN, *Circuit Judge*:

Appellant Birnbaum was convicted upon two counts, the only counts in which he was named, of a four-count indictment charging him with having conspired with others to bribe, and with having bribed, an Internal Revenue Agent. He was sentenced to serve one year on each count, the terms to run concurrently. Upon appeal to our court the conviction was affirmed, *United States* v. *Birnbaum*, 373 F. 2d 250 (2 Cir.), *rehearing denied*, 375 F. 2d 232 (2 Cir.), *cert. denied*, 389 U. S. 837 (1967).

At the time of the imposition of the sentence on April 1, 1966, the trial judge, Judge Irving Ben Cooper, knowing that Birnbaum would seek a reversal of his conviction, as he had successfully done after a prior conviction upon the

same indictment, see *United States* v. *Birnbaum*, 337 F. 2d 490 (2 Cir. 1964), addressed the following remarks to him.

> . . . In your case there are factors which should be considered in mitigation of sentence. . . .
>
> * * * * *
>
> . . . There are . . . those . . . who still believe in you, including Mr. Justice Heller, and who seem genuinely anxious about your fate.
>
> I feel compelled to make the observation that you have had only a nodding acquaintance with charity and communal affairs. . . . You amassed a fortune . . . . Yet, you gave back nothing; nothing, other than a token contribution. You gave nothing back to your school, to your community, to your country.
>
> * * * * *
>
> . . . You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> For the present, then, in the light of your fame [sic] of mind, let me just add that if your conviction is sustained, this Court *might*, and *I emphasize might*, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth in doing with constancy those acts which will really help your fellow Americans and at the same time enhance you [sic] personal well-being immeasurably, I say this Court might consider . . . a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651. (Emphasis supplied.)

So for all these reasons, in mitigation of sentence, and especially in light of the additional period of an-

guish to you since the verdict on the first trial, this Court adjudges you guilty as charged and convicted, and it is adjudged that [the defendant is hereby committed to the custody of] the Attorney General or his authorized representative for imprisonment for a period of one year on each count to run concurrently with each other.

Birnbaum's attorneys interpreted the court's remarks to mean that if the conviction was sustained Birnbaum could, by following the guidelines contained in the court's remarks, avoid imprisonment and receive probation.

Judge Cooper's reference to Justice Heller prompted Birnbaum to seek out Justice Heller and ask for advice on how best to follow the course seemingly suggested by Judge Cooper's remarks. Justice Heller[1] then approached Judge Cooper at a charity dinner and mentioned Birnbaum's case and the fact that Birnbaum was troubled because he did not know what to do in light of what Judge Cooper had said at the sentencing. Judge Cooper told Justice Heller that Justice Heller could, if he wished, provide guidance for Birnbaum. Justice Heller then suggested three charities in which Birnbaum might become active, and Judge Cooper indicated that he had no objection.

Thereafter, Birnbaum, while his appeal was pending, contributed large amounts of money[2] to the charities and devoted one or two days a week to their work. This fact was mentioned when Justice Heller happened later to meet

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1 Justice Louis B. Heller is a Justice of the Supreme Court of the State of New York, Second Judicial District. Justice Heller had served as an Associate Justice of the New York City Court of Special Sessions at a time when Judge Cooper was Chief Justice of that court.

2 Birnbaum is said to have contributed $85,000 to various charitable organizations and pledged an additional $25,000 to help meet their needs.

Judge Cooper at the theater. According to Justice Heller, Judge Cooper said: "That is fine, that is good."[3]

After Birnbaum's conviction had been affirmed and certiorari to the United States Supreme Court from the Court of Appeals had been denied, Birnbaum, represented by counsel, moved Judge Cooper pursuant to Rule 35, Fed. R. Crim. P. for a reduction of the one year imprisonment term and for a suspension of the imprisonment sentence. The motion was argued at length on November 15, 1967. Decision was reserved, and Judge Cooper called for an updated probation report.[4] On December 6, 1967, Judge Cooper filed an opinion denying Birnbaum's application. He stated that he had "given long and careful consideration to all of the facts and circumstances of this case, including the defendant's background, the nature and gravity of the offense of which he stands convicted, the probation report from which we have obtained the greatest possible assistance, the papers on which this application is predicated and the presentations of learned and able counsel," and was "satisfied that the sentence imposed on April 1, 1966, should not be disturbed."

Birnbaum then moved for a reargument of this motion. Judge Cooper considered this new motion and, on January 4, 1968, denied it after "estimating the extent of defendant's activities since imposition of sentence and weighing the justice due community and defendant alike . . . ." Birnbaum timely appealed from this order.

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3 During the hearing before Judge Wyatt it was stated by counsel that Justice Heller had said that Judge Cooper had so remarked.

4 Apparently this was the first official probation report prepared by an officer of the probation service of the Southern District of New York. The probation officer interviewed Birnbaum twice before submitting his report to Judge Cooper.

On January 23, 1968, Birnbaum applied to the district court for an order to show cause why a writ of *coram nobis* should not be granted, to review and correct the sentence so as to place Birnbaum on probation, and, in any event, why, inasmuch as Birnbaum was challenging the legality of Judge Cooper's act, a hearing should not be had at which Judge Cooper would be a summoned witness, to present the relevant facts to the court. This application was heard on January 27 by Judge Inzer Wyatt who promptly denied it after extensive oral argument. This order has been appealed to this court.

The two appeals have been consolidated, several stays of execution have been granted, and appellant has not yet commenced to serve his sentence of imprisonment.

Appellant first contends that he has been serving a suspended sentence and has legally been a probationer since April 1, 1966; therefore Judge Cooper's orders directing that appellant's prison sentence be served constituted an illegal revocation of probation. 18 U. S. C. §§3651-3656. Appellant maintains that Judge Cooper's sentencing statements and subsequent actions have shown a judicial intention to invoke the provisions of the Federal Probation Act and to place appellant on a probationary status. Of course Judge Cooper's actions failed to comply with the requirements of the Federal Probation Act, 18 U. S. C. §§3651-3656 which appellant admits, but appellant argues that the Federal Probation Act is a remedial statute which must be liberally construed, e.g., *Scalia* v. *United States*, 62 F. 2d 220, 223 (1 Cir. 1932); *Reeves* v. *United States*, 35 F. 2d 323, 325 (8 Cir. 1929); *Nix* v. *James*, 7 F. 2d 590, 592 (9 Cir. 1925), and liberal construction of the Act permits the status of probation to exist under the Act even though the technical requirements that are prerequi-

sites under the statutes authorizing the act of grace are not fulfilled. *McHugh* v. *United States*, 230 F. 2d 252 (1 Cir.), *cert. denied*, 351 U. S. 966 (1956); *Campbell* v. *Aderhold*, 36 F. 2d 366 (N. D. Ga. 1929).

This contention must be rejected. Judge Cooper's statements at appellant's sentencing do not reflect any present intention to place the appellant on probation. At most, the statements only contain an intimation that if appellant made an "impressively convincing showing" of a change in attitude and character before the jury's verdict received the final approval of the appellate courts the sentencing court *might then* consider suspending the appellant's sentence of imprisonment and might grant probation. The lack of a clear, present intent at the time of sentencing to impose some form of probationary status distinguishes the present case from those cited by appellant. See *McHugh* v. *United States, supra; Campbell* v. *Aderhold, supra.* Both *McHugh* and *Campbell* involved situations where the sentencing judge obviously intended to place the convicted person on probation but failed to articulate his intentions unambiguously.

Judge Cooper's and Justice Heller's private conversations at social gatherings do not materially aid appellant's contentions. Even if intended to result in probationing appellant, the conversations could not have had that legal effect. Liberal construction of the Federal Probation Act does not permit a complete disregard of the technical requirements of the Act. The Act expressly contemplates extensive investigation of an accused's background by the probation service of the court before probation may be initially authorized, and close supervision thereafter by a person formally appointed by the court for that purpose, see 18 U. S. C. §3654, who usually is an officer of the pro-

bation service. See 18 U. S. C. §§3651-3656; Rule 32, Fed. R. Crim. P. To allow the status of probation to be formulated and administered during purely social gatherings would not only cause a great deal of enforcement uncertainty but would be contrary to the general policies underlying the Act. Furthermore, Justice Heller's private conversations with Judge Cooper only reflect Justice Heller's willingness to aid appellant in achieving the necessary change in his character which might merit a later grant by Judge Cooper of probationary grace. Judge Cooper's replies to Justice Heller's comments only show that he had no objection to Justice Heller's activities on behalf of Birnbaum.

A complete and thorough reading of the record reveals that until the *coram nobis* hearing before Judge Wyatt neither appellant nor anyone who had been present at the sentencing of Birnbaum believed that Judge Cooper had then indicated that Birnbaum had been granted probation. The fact that certain leaders of the charitable organizations Birnbaum was aiding may have erroneously believed that Birnbaum's sentence had been suspended when the sentence was imposed has little bearing on the meaning of Judge Cooper's sentencing remarks.[5] It is indeed possible that appellant and his attorneys may have misinterpreted Judge Cooper's language relative to any possible future judicial action, but any such unfortunate misconceptions of appellant and others could not reasonably create in anyone's mind a belief that appellant was serving his sentence pending adjudication of his appeal from his conviction. There

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5 A number of charitable organizations, in which Birnbaum was active, submitted letters and affidavits below requesting that Birnbaum be *continued* on probation. Counsel representing charities assisted by Birnbaum was permitted to file briefs and to argue in the district court and in the Court of Appeals.

just was no language indicating Birnbaum was to enjoy probationary status under the Act, only that execution of the imprisonment sentence was to be stayed pending appeal.

Appellant next contends that if his appeal from his conviction was of no avail Judge Cooper conditionally promised him probationary grace if he "realigned his sights," that he relied on that promise, and that the protection of the integrity of the judicial system dictates that this promise be fulfilled. A careful reading of Judge Cooper's statement, however, reveals no conditional promise that appellant's imprisonment sentence would be suspended but only a suggestion that probation remained a feasible possibility. After having been convicted by juries at two trials appellant may well have overly reacted to the faint glimmer of hope offered by the judge's statement. But appellant's state of mind is irrelevant; that he may have been misled by his own wishful thinking or by the overly optimistic advice of counsel provides no basis for the relief he seeks. Cf., *Sasser* v. *United States,* 352 F. 2d 796 (6 Cir. 1965), *cert. denied,* 385 U. S. 883 (1966).

Even conceding that a vague conditional promise could be extracted from Judge Cooper's statement, Judge Cooper unambiguously reserved the power to reassess the situation and decide whether, after Birnbaum's conviction had become final, probation would be inappropriate in light of all relevant factors, including that of appellant's behavior while his appeal was pending. Probation is not a matter of right, or a contract; it is a matter of grace, e.g., *Burns* v. *United States,* 287 U. S. 216, 220 (1932); *Fox* v. *United States,* 354 F. 2d 752, 754 (10 Cir. 1965); *Bryson* v. *United States,* 265 F. 2d 9 (9 Cir.), *cert. denied,* 360 U. S. 919 (1959); *United States* v. *Gerson,* 192 F. Supp. 864 (E. D.

Tenn. 1961), *affirmed,* 302 F. 2d 430 (6 Cir. 1962), and it should only be granted when both the individual's and the public's interests will be best served by the suspension of sentence. See *Toyosaburo Korematsu* v. *United States,* 319 U. S. 432, 435 (1943); *Kirsch* v. *United States,* 173 F. 2d 652 (8 Cir. 1949); *United States* v. *Nix,* 8 F. 2d 759 (S. D. Cal. 1925); *United States* v. *Durkin,* 63 F. Supp. 570 (N. D. Ill. 1945).

Birnbaum further asserts that fundamental ideas of fairness demand that he be placed on probation because he was misled by Judge Cooper's remarks and actions. But Birnbaum did not lose any basic rights by following the advice of Judge Cooper. He was not induced to plead guilty by the judge's alleged promise of probation. See, e.g., *Machibroda* v. *United States,* 368 U. S. 487 (1962); *Shelton* v. *United States,* 356 U. S. 26 (1958); *Walker* v. *Johnston,* 312 U. S. 275 (1941). Birnbaum was convicted by a jury after a full and fair trial. Birnbaum may indeed have devoted much time and effort and have contributed large sums to charities in the hope that these activities might keep him free from confinement. That was a calculated risk that he undertook in an effort to persuade the sentencing judge that he should not suffer confinement, an effort that proved fruitless.

Lastly, appellant contends that the unusual circumstances of this case dictate that this court should either formalize a probationary status for him or order that the court below issue a writ of *coram nobis* with the resulting evidentiary hearing. Basically, the appellant appears to believe that Judge Cooper abused his discretion by not granting appellant probation after dangling the possibility of probation before him if he "realigned his sights," which the judge's statement induced him to do.

We see no abuse of discretion on the part of Judge Cooper or any need for any further investigation in this matter. Judge Cooper appears to have given long and detailed consideration both to the appellant's original one year imprisonment sentence and to appellant's subsequent motion for a reduction and a suspension of that sentence. It appears that in the judge's eyes appellant did not make the "impressively convincing showing" that the judge felt was necessary before he could grant probation. Also, the judge did not seem to feel that the best interest of the public would be served by granting appellant probation.

The question before us for decision is not whether this court or another sentencing judge might have reacted differently to the request for modification of the sentence. Absent an abuse of discretion, Judge Cooper's determination must stand and cannot be disturbed on appeal. E.g., *Heath* v. *United States,* 375 F. 2d 521 (8 Cir. 1967); *United States* v. *Piccioli,* 352 F. 2d 856, 859-860 (2 Cir. 1965); *Mount* v. *United States,* 333 F. 2d 39, 45 (5 Cir.), *cert. denied,* 379 U. S. 900 (1964); *Pependrea* v. *United States,* 275 F. 2d 325, 329-330 (9 Cir. 1960); *Roth* v. *United States,* 255 F. 2d 440 (2 Cir.), *cert. denied,* 358 U. S. 819 (1958); *United States* v. *Rosenberg,* 195 F. 2d 583, 603-609 (2 Cir.), *cert. denied,* 344 U. S. 838 (1952).

Moreover, there being no abuse of discretion which would permit appellate reversal of the sentencing judge's decision to adhere to the unreviewable sentence he had originally imposed, it would also be improper to permit review through the use of a collateral method, such as a writ of *coram nobis.*

Affirmed.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

"This Court has given long and careful consideration to all of the facts and circumstances of this case, including the defendant's background, the nature and gravity of the offense of which he stands convicted, the probation report from which we have obtained the greatest possible assistance, the papers on which this application is predicated, and the presentations of learned and able counsel. After due deliberation, this Court is satisfied that the sentence imposed on April 1, 1966, should not be disturbed. Application denied.

So Ordered:

Irving Ben Cooper
United States District Judge

New York, New York
December 6, 1967"

"I have been deeply moved by the utter sincerity of the advocates on both sides of this application for reargument; by the touching show of faith demonstrated by those who affixed their signatures to earnest statements in defendant's behalf; and by those high-minded citizens who called on me to attest their belief in his potential for good.

"Upon reflection seemingly without end, and after estimating the extent of defendant's activities since imposition of sentence and weighing the justice due community and defendant alike, on the merits I am constrained to and do grant the motion for reargument,

and upon such reargument adhere to the denial entered upon the original application on December 6, 1967.

So Ordered:

New York, N. Y.
January 4, 1968

Irving Ben Cooper
U.S.D.J."

"This application is denied after hearing in open Court January 27, 1968"

Inzer B. Wyatt
U.S.D.J.

January 27, 1968

APPENDIX B

Constitutional Provisions, Statute and Rule Involved

U. S. Constitution
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 4208(b), 72 Stat. 845

If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

Federal Rules of Criminal Procedure

Rule 35

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.